CHAI MING v. THE OVERSEAS ASSCE. CORPN. LTD.

[O.C.J. (Suffian J.) May 31, 1962]

[K.L. — Originating Motion No. 4 of 1962]

Arbitration — Award as a specific question of law — Interference by Court.

Master and Servant — "Workman" — Independent contractor — Workmen's Compensation Ordinance, 1952.

The applicant employed two tree-fellers to fell about 2,000 dead rubber trees at piece rates. To cover his risks under the Workmen's Compensation Ordinance, 1952, he took out a workmen's compensation policy with the respondent covering the tree-fellers only if they were workmen within the meaning of the said Ordinance. Subsequently one of the tree-fellers was killed by a falling tree. The applicant contended that the deceased was a workman within the meaning of the Ordinance while the respondent contended that he was not. As required by the policy the dispute was referred to arbitration. The applicant now moved that the decision of the arbitrator to the effect that deceased was not a workman within the provisions of the Workmen's Compensation Ordinance be set aside or remitted.

Held: (1) the court cannot interfere with the award as a specific question of law was referred to the decision of the arbitrator and the parties are bound by it although it may be erroneous in law;

(2) assuming that the court can interfere in the case, there was nothing, looking at the award alone and not beyond its four walls, to indicate that the arbitrator misconducted himself as alleged in the grounds of appeal;

(3) on the face of the award the arbitrator came to the right conclusion that the deceased was an independent contractor and not a workman within the provisions of the Workmen's Compensation Ordinance.

Cases referred to:—

(1) *F.R. Absalom Ltd.* v. *Great Western (London) Garden Village Society Ltd.* [1933] A.C. 592, 607.

(2) *King* v. *Duveen* [1913] 2 K.B. 32.

(3) *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co. Ltd.* [1923] A.C. 480, 487.

(4) *James Clark (Brush Materials) Ltd.* v. *Carters (Merchants) Ltd.* [1944] 1 K.B. 566.

ORIGINATING MOTION.

Heng Cheng Swee for the applicant.

M. Shankar for the respondent.

Cur. Adv. Vult.

Suffian J.: Chai Ming, the applicant, employed two tree-fellers to fell about 2,000 dead rubber trees at piece rates on Rasa Estate. To cover his risks under the Workmen's Compensation Ordinance, 1952, on the instructions of the manager of the Estate he took out a Workmen's Compensation policy with the Overseas Assurance Corporation Ltd., the respondent. It seemed that the policy provided that the tree-fellers were covered only if they were workmen within the meaning of the Ordinance. On 26th May, 1959, one of them, Ng Then Teik, was killed by a falling tree while at work. Chai Ming contended that the deceased was a workman within the meaning of the Ordinance while the insurers contended that he was not. As required by the policy, the dispute was referred to arbitration and on 28th December, 1961, Inche' N. A. Marjoribanks, advocate and solicitor, the sole arbitrator, published his award.

Judging from his award, several questions were submitted to him and it seems that question 4 (b) of the submission asked whether or not the deceased was a workman within the meaning of the Workmen's Compensation Ordinance. He answered this in the negative. The effect of this (it would seem) was that compensation in respect of the deceased was not payable under the policy.

Chai Ming moved that the award as regards question 4 (b) of the submission be set aside or remitted on the following grounds:

"(1) that the Arbitrator misdirected himself in holding that though the deceased was a workman (in the non-technical sense) employed by Chai Ming, he was not a 'workman' within the meaning of the Workmen's Compensation Ordinance, 1952;

(2) that the Arbitrator misconducted himself in that:

(a) due consideration was not given to the simple nature of the work of felling dead trees which required little continuous supervision or to the skill of the fellers who consequently required little supervision;

(b) he failed to recognise that the right to hire and fire may lie dormant and not be unduly exercised because of the shortage of labour in the work of felling dead trees;

(c) he failed to give due consideration to the kepala's assertion that he supervised both the tree felling and general work undertaken by other workers employed by Chai Ming;

(d) he confused employment at contract or piece rates with a contract for services;

(3) that the said award failed to take into consideration section 19(1) of the Workmen's Compensation Ordinance, 1952."

After careful consideration I have decided that the motion be dismissed, and it is hereby dismissed, on the following grounds. First, I do not think that the Court can interfere with this award. Lord Russell in the House of Lords' case of *F.R. Absalom Ltd.* v. *Great Western (London) Garden Village Society Ltd.* [1] said:—

"... it is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision ... The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the Court can interfere if and when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one."

I have here before me only a copy of the award and nothing else. From paragraph 3 thereof, it seems clear to me that question 4 (b) of the submission asked the arbitrator to decide whether or not the deceased was a workman within the meaning of the Workmen's Compensation Ordinance. It also appears that the arbitrator heard evidence on this question and came to certain findings of fact, because after saying in his award that he found that the deceased was not a workman within the meaning of the Ordinance, he proceeded to give reasons in law and in

fact. I hold that here, as in *King* v. *Duveen* [2], a specific question of law was referred to the decision of the arbitrator. There one of the questions submitted for decision by the arbitrator was "whether under the agreement of October 25, 1905, the executors of Sir Joseph Joel Duveen are liable to pay damages in respect thereof to Mr. Henry James King, and, if they are so liable, what damages should be paid." Other questions referred to the arbitrator involved his ascertaining certain facts and on the basis of the facts he found he gave an answer to the question of law referred to him. It was held that no grounds existed for setting aside the award, for as Bray J. said at page 37:—

> "The parties agreed to be bound by the decision of the arbitrator and they are bound by it, although it may be erroneous in law."

Secondly, assuming that the question referred to the arbitrator here became material only incidentally to the decision at which he arrived and therefore the Court can interfere, the Court can interfere if, but only if, there is an error in law on the face of the award. Lord Dunedin in the Privy Council case of *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning and Weaving Co. Ltd.* [3] said:—

> "An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is a basis of the award and which you can then say is erroneous."

This means that I should pay no regard to any of the four sub-grounds in ground 2 of the motion, because looking at the award alone and not beyond its four walls, there is nothing to indicate one way or another whether or not—

(a) the deceased's work required little continuous supervision or his skill required little supervision;

(b) the right to hire and fire him might lie dormant because of shortage of labour in the work of felling dead trees;

(c) the kepala asserted that he supervised both the tree felling and the general work undertaken by other workers employed by Chai Ming; and

(d) the arbitrator confused employment at contract or piece rates with a contract for services.

As regards (a), (b) and (c), the law is that in determining whether an award should be remitted or set aside on the ground that there is an error of law appearing on the face of it, the Court is not entitled to draw any inference as to the finding by the arbitrator of facts supporting the award, but must take the award at its face value, *James Clark (Brush Materials) Ltd.* v. *Carters (Merchants) Ltd.* [4]. As regards (d), according to the definition of "workman" in section 2(1) of the Ordinance a person employed at piece rates may also be a workman, but there is nothing on the face of the award to indicate that the arbitrator has confused employment at contract or piece rates with a contract for services. Nor in my view can the award be set aside or remitted on ground 3 because there is nothing on the face of the award to indicate whether or not the arbitrator has failed to take into consideration section 19(1) of the Workmen's Compensation Ordinance, if it be relevant.

Thirdly, on the face of the award the arbitrator clearly came to the right conclusion. He found that there was no control by Chai Ming over the method of doing the felling work, the deceased had the right to choose his own working hours and the number of trees to fell on any particular day, he worked for such periods as he wished and ceased work when he wished, Chai Ming had no right to suspend or dismiss the deceased and the deceased did not have to give notice of his termination of employment, and that the only notice Chai Ming took of the deceased's work was to check the number of trees felled for the purpose of calculating the amount of remuneration due. On these facts the deceased clearly was an independent contractor, and not a "workman" which is defined by section 2(1) of the Ordinance as a "person who has . . . entered into or works under a contract of service . . . with an employer . . ." It is true that the arbitrator answered question 4 (a) of the submission by saying that the deceased was a workman employed by Chai Ming and question 4 (c) by saying that the deceased was killed in an accident which arose out of and in the course of his employment, but, rejecting Chai Ming's argument, I see nothing in this which is inconsistent with his answer to question 4 (b), the subject of this motion, because in his answer to question 4 (a) the arbitrator was careful to say that the deceased was only a workman in the non-technical sense and in his answer to question 4 (c) he did not say that the deceased was in employment as a "workman" within the meaning of the Ordinance and it may be presumed that all that the arbitrator meant was that the deceased was in employment as an independent contractor.

In argument, Chai Ming also made the point that the policy in providing that the question whether or not the deceased was a workman should be referred to arbitration purported to oust the jurisdiction of the arbitrator under the Workmen's Compensation Ordinance, 1952, and it was therefore void as being contrary to public policy. The insurers replied that this provision merely said that if there was any dispute the parties should first arbitrate and then litigate and it did not completely oust the jurisdiction of the Court. The terms of the policy were not apparent on the face of the award and I am not entitled to say that if they included such a provision it was void as being contrary to public policy.

This motion is dismissed, with costs.

Motion dismissed.

Solicitors: *Rajendra & Teik Ee; Shearn, Delamore & Co.*